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No. 03-319

IN THE

Supreme Court of the United States

UNION CARBIDE CORP.,
Petitioner,

v.

THE HONORABLE ARTHUR M. RECHT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner's "Statement of the Case" conveys a misleading impression of events before the West Virginia courts. Most significantly, petitioner elides almost entirely the important fact that the so-called "mass trial" that allegedly deprived Union Carbide of its due process right to defend itself had narrowed to only a *single* defendant (Union Carbide) by the time the defense presented its case to the jury. Accordingly, contrary to petitioner's arguments, the "Phase I" trial of issues common to plaintiffs suing Union Carbide provided the company an ample—indeed, generous—opportunity to defend itself. Moreover, future phases of the proceedings will allow the company to litigate causation and damages as to specific plaintiffs. In short, a more complete under-

standing of the proceedings before the West Virginia courts leaves no doubt that intervention by this Court is neither necessary nor desirable at this interlocutory stage.

1. ***Background of West Virginia Trial Court Rule 26.01.*** This Court has observed that our country is in the midst of an asbestos-litigation crisis. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). This litigation crisis results from an asbestos health crisis due to the continued manufacture and industrial use of asbestos long after its deleterious effects on human lungs became known.

Contrary to Union Carbide's baseless assertion, however, asbestos plaintiffs have not "flocked," *see* Union Carbide Petition for Writ of Certiorari (May 9, 2003), at 2 ("Pet."), to West Virginia as a result of the state's effective trial management procedures. Rather, asbestos litigation is naturally concentrated in areas—including West Virginia—with high levels of asbestos-related disease and mortality.[1] This petition relates to asbestos use at five plants located in West Virginia (at South Charleston, Institute, Alloy, Technical Center, and Sistersville) and one plant in Marietta, Ohio, directly across the Ohio River from Parkersburg, West Virginia.[2]

As a result of high levels of industrial asbestos use at these and other West Virginia facilities, the state's judiciary has been obliged to develop new trial management techniques to address large volumes of asbestos cases "threaten[ing] . . .[to]

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[1] While petitioner makes much of the fact that West Virginia ranked second among the fifty states in asbestos suit filings between 1988 and 1997, *see* Pet. 2, it neglects to mention that West Virginia has the third-highest asbestosis crude mortality rate among the states. *See* Centers for Disease Control and Prevention *et al.*, *Work-Related Lung Disease Surveillance Report 1999*, figure I-5.

[2] Parkersburg is substantially the largest city in either state in that part of the Ohio River Valley.

paralyz[e]" the lower courts' active dockets. *West Virginia ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 303-04 (W. Va. 1996). West Virginia Trial Court Rule 26.01—under which these cases have proceeded—directly reflects the "specialized approach" to asbestos personal injury litigation that the West Virginia courts have developed "over the past twenty years," and that they have successfully applied to resolve "tens of thousands of asbestos-related claims." Appendix to Union Carbide Petition for Writ of Certiorari (May 9, 2003), at 30a ("Pet. App.").

The heart of West Virginia's approach has been to sever, for initial trial, "the liability issues which are *common*" to large groups of pending cases. Pet. App. 30a. Subsequent proceedings, involving small groups of plaintiffs, address all other issues, including those relating to exposure, causation, and compensatory damages. *Id.* at 33a. This "common-issues trial" approach to asbestos litigation was expressly approved by the West Virginia Supreme Court in the 1996 *Appalachian Power* case. The court found that while "common issues" trials represent a "novel method of fact resolution," they have "much . . . to recommend [them] to all parties because [they] represent[] an effective and efficient manner to bring closure to these . . . [extremely numerous] cases without depleting valuable resources in the event that they are needed to satisfy a monetary award." *Appalachian Power*, 479 S.E.2d at 305.

The efficiency of the "common issues" approach derives from eliminating the repetition of key witnesses and evidence. As one of the judges who presided over *Appalachian Power* observed in connection with his earlier experience of claim-by-claim asbestos litigation: "The anatomy of an asbestos trial, about 50 percent of it, never changed. It was exactly the same, every case . . . . [Y]ou'll have a little scientific evidence on what [asbestos] is, and then how does it hurt somebody if it's inhaled. And then you've got this big body of state of the art evidence, . . . the information about

who knew what when, or when certain knowledge was available. . . . [W]ith respect to each defendant, what they knew and when they knew it determines their liability. That is repeated every time a case is tried, time and time again." 11/08/00 Tr. 56-57.

To implement the "common issues" approach, the *Appalachian Power* court "assigned three circuit court judges to preside over [common-issue] trials of [all] those asbestos-related cases which were [then] pending on the dockets of circuit courts throughout the state." *West Virginia ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 371 (W. Va. 2001). Pursuant to that Order, a series of six common-issue "trials were held in Kanawha County and Monongalia County, with the last [of these] common-issue trials held in 1998." *Id.* at 371. Those six trials "resulted in the resolution, in whole or in part, of what is estimated to be over 20,000 asbestos-related cases." *Id.* at n.6.[3]

3. *The Operation of TCR 26.01.* Following the resolution of the Kanawha and Monongalia County cases, the West

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[3] West Virginia is by no means alone among the states in its use of common-issue trials to successfully manage the enormous caseloads created by asbestos litigation. The Maryland courts, for example, ordered the consolidation of more than 8,500 individual asbestos actions—initially involving over 100 different defendants—for initial trial of common issues. *See ACandS v. Godwin*, 667 A.2d 116, 120 (Md. 1995). The Maryland Court of Appeals rejected defendants' claim that this approach denied them due process, even though "the 8,555 plaintiffs in the consolidation ha[d] different occupations, were exposed at different times, at different workplaces, have different diseases, and different medical histories." *Id.* at 146. The Court of Appeals found that "none of these factors diminishes the commonality of the Phase I issues." *Id.* Citing a long history of state and federal asbestos cases in which consolidation and common-issues trial methods had been used and upheld on appeal, the Court of Appeals found it "senseless to repeat the presentation of the same evidence against the same defendants in successive, individual trials or mini-consolidations." *Id.* at 146-49.

Virginia Supreme Court developed a generalized procedure "by which alternatives [to the traditional case-by-case trial] could be examined [in various mass litigation situations] and appropriate trial management plans could be developed." *Allman*, 551 S.E.2d at 371. That generalized procedure is set forth in Trial Court Rule 26.01. *See id.* at 371 and n.7.

Rule 26.01 establishes a "Mass Litigation Panel" ("Panel") consisting of six circuit judges appointed by West Virginia's Chief Justice to three-year terms. Pet. App. 24a (TCR 26.01(a)). Under the rule, any party, judge, or the administrative director of the West Virginia courts may file a motion seeking referral of actions to the Panel. The motion must identify, *inter alia*, "the nature of the actions sought to be referred," the "basis for the request," and "a listing of the particular cases in all the circuits for which a referral is being requested." Pet. App. 27a. That motion must be "served on all the parties, all judges in actions which are the subject of the motion, and the Administrative Director." *Id.* Following service, "[a]ny party shall have twenty (20) days . . . to file a reply memorandum stating its position and opposition, if any." *Id.* "Any affected judge may file a reply memorandum within ten (10) days thereafter." *Id.* Finally, after the filing of a motion and replies, the Chief Justice of the State Supreme Court may either act directly on the motion or recommend a hearing to inquire further into the desirability of the proposed referral. *Id.*

4. ***The Present Proceedings.*** In November 2000, two West Virginia circuit judges referred asbestos cases involving approximately 8,000 plaintiffs and 250 defendants to the Panel pursuant to 26.01(e). The Chief Justice referred the motion to a trial judge "for the purpose of conducting a hearing and submission of findings of fact and a recommendation to the Chief Justice regarding the motion to refer." 11/17/00 Administrative Order at 1.

In October 2000, the trial judge held a status conference to determine goals for the Rule 26.01 hearing. He determined that an inquiry into common issues of law and fact would be a key issue. At the Rule 26.01 hearing in November 2000, the judge heard lengthy argument and testimony on that subject. For example, counsel for several defendants argued that the cases should not be referred because they lacked sufficient "commonality," while a representative for most of the many remaining defendants indicated that "there are some common issues and that there is a basis, under Rule 26" for consolidation. 11/08/00 Tr. 46. Following the hearing, the Chief Justice issued an administrative order accepting the recommendation that the referral motion be granted. 11/17/00 Administrative Order.

The trial judge initially assigned to develop a case management plan for these cases called for a series of traditional trials on "all issues" between small groups of plaintiffs and defendants. This strategy obviously departed from the "common issues" approach approved by the West Virginia Supreme Court in *Appalachian Power*, and both the plaintiffs and defendants petitioned the state's high court to block implementation of the plan. The West Virginia Supreme Court ruled that this original plan did not "fully meet" the need for a "fair[] and expeditious[]" approach to resolving the pending asbestos cases. *Allman*, 551 S.E.2d at 375-78.

After that decision, the West Virginia Chief Justice designated a new supervising judge who, in September 2001, adopted a "Report"—which petitioner refers to as the "Trial Scheduling Order" ("TSO")—setting forth a new case management plan for these cases. *See* Pet. App. 31a. In particular, the TSO canceled the "all issues" trials that were previously scheduled and indicated that all cases not successfully mediated by March 4, 2002, would be categorized into three groups—1) products liability claims, 2) premises claims, and 3) "deliberate intent" claims by employees under

West Virginia's workers compensation statute. The TSO scheduled for initial trial "liability issues which are *common* to all pending cases." Pet. App. 30a.

In December 2001, Mobil Corporation—which was then one of about 250 defendants in the case—filed a motion in the West Virginia Supreme Court seeking a writ of mandamus or prohibition to prevent implementation of this second trial plan. Mobil argued that the trial court had failed to conduct a proper inquiry into whether "mass litigation" could provide a fair determination of the claims presented. The West Virginia Supreme Court denied relief, and Mobil petitioned this Court for a writ of certiorari, arguing that the West Virginia courts had violated due process by purportedly aggregating thousands of claims against hundreds of defendants without any inquiry into the commonality of those claims. Union Carbide filed a brief supporting Mobil's effort to obtain certiorari. Plaintiffs opposing the petition pointed out (*inter alia*) that the West Virginia courts in fact *had* conducted a proper inquiry into commonality. This Court denied the petition. *See Mobil Corp. v. Adkins*, 537 U.S. 944 (2002).

On August 12, 2002, the trial court held a hearing to address certain remaining trial management issues. First, the court heard argument as to whether the juries determining common issues of fault in Phase I should also consider whether punitive damages "multipliers" should be applied to particular defendants based on the evidence presented regarding what they knew about the dangers of asbestos, when they knew it, and what actions they took as a result.[4]

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[4] A punitive damages "multiplier" allows total damages to be set by establishing punitive damages as a "multiple" of compensatory damages. Petitioner does not challenge the propriety of punitive damages multipliers generally.

Plaintiffs argued that it would make sense for the Phase I juries to consider this question:

> When you have the defendant there whose conduct is at issue and you have the evidence [of fault] that will shed a light on that conduct, then that same jury should not be told to stop at the end and not answer [the punitive damages] question when it has all of the information before it to answer that question.

8/12/02 Tr. 57.

The trial court agreed, holding that the Phase I juries would assign a punitive multiplier on the basis of the evidence they would hear as to defendants' "reprehensibility." 8/12/02 Tr. 95-97. In addition, as petitioner points out, the trial court also ruled that West Virginia law would be applied at the "first phase"—the common issues phase—of trial. 8/12/02 Tr. 172. Finally, the court ruled that employees' "deliberate intent" claims under W. Va. Code § 23-4-2 would be rescheduled to December 2002, rather than being heard at the same time as the products liability and premises cases. 8/12/02 Tr. 26.

Following the August hearing, as the trial date approached, most of the parties reached settlements. Indeed, as petitioner acknowledges, by the time of the September 23 hearing on motions in limine, *every one* of the "premises liability" defendants except for Union Carbide had settled, and only a small handful (including Union Carbide) of "products liability" defendants remained. Accordingly, the trial court determined that it would be sensible to combine the premises trial against Union Carbide with the products liability trial against Union Carbide and a few other defendants, rather than have two juries listen to the same evidence twice regarding what Union Carbide knew and when Union Carbide knew it. The court pointed out that the problem of "commonality of witnesses . . . if we had separate trials" had always been a concern, and that the "efficient, economical way" to try these

cases now that nearly all the defendants had settled was in a single proceeding. Pet. App. 61a.

The Phase I trial of common issues commenced on September 26, 2002, and initially involved claims against Union Carbide, Mobil Corporation, and Amchem Products, Inc. Both Mobil and Amchem left the case following the court's ruling on motions for judgment as a matter of law—Amchem because it prevailed on its motion, and Mobil because it settled. Pet. 13 and n.16. Accordingly, when it came time for defendants to present their case to the jury, *Union Carbide was the only defendant left in the case. See, e.g.,* Charles Shumaker, "*Mobil Settles; Carbide Now Lone Asbestos Defendant*," Charleston Gazette, October 10, 2002, at 1C.

Petitioner took *over a week* to put on its defense at trial, presenting lengthy (and conflicting) argument and testimony that Union Carbide's particular brand of asbestos ("Calidria") does not cause asbestos-related disease, and that, in any event, the company had discharged its duty to warn about the hazards of its asbestos products. *See* Pet. 13. On the premises claims, Union Carbide presented detailed evidence of its industrial hygiene policies and argued that the contractor at each premise (not the corporation Union Carbide) was contractually responsible for the protection of employees.

On October 24, 2002, after a day and a half of deliberations, the jury returned its verdict on the Phase I "common issues" in the form of answers to detailed "special interrogatories." On the product liability claims, the jury found that "Calidria" *was* a defective product, but that Union Carbide had *not* acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference" in selling it, and therefore there was no need for a punitive damages "multiplier" in those cases. Pet. App. 92a-93a. On the premises claims, the jury found that Union Carbide *had* maintained "unreasonably dangerous" sites from

1945-1980 and, in so doing, *had* acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference." Pet. App. 91a, 94a. Accordingly, the jury assigned a punitive damages multiplier of three to be applied in premises cases in which plaintiffs succeed in showing causation and compensatory damages.

On November 4, 2002, former Union Carbide employees pursuing "deliberate intent" claims under W. Va. Code § 23-4-2 moved the trial court to apply offensive issue preclusion—which the West Virginia courts call "offensive collateral estoppel"—based on the Phase I jury's answers to the special interrogatories.[5] The court found that under West Virginia law, five elements must be satisfied for plaintiffs to prevail on a claim of offensive collateral estoppel:

1. The issues that will arise in the second case must have been "actually litigated" in the first case;
2. The first judgment must have been a final judgment rendered on the merits by a court of competent jurisdiction;
3. There cannot have been any change in the controlling facts or legal principles since the earlier case;
4. There can be no special circumstances indicating that applying the earlier judgment would be unfair; and
5. Estoppel is not available if the plaintiffs asserting it could have easily joined the first case, but failed to do so.

Pet. App. 16a-17a (citing West Virginia cases).

The court further found that plaintiffs had two different kinds of claims under § 23-4-2, and that the "actually liti-

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[5] Plaintiffs' motion was captioned "Motion for Collateral Estoppel to Prevent the Relitigation by Union Carbide of the Liability Elements of Deliberate Intent that were Determined in the Premises Liability Trial." Pet. App. 12a.

gated" requirement applied differently to the different claims. Specifically, under § 23-4-2(c)(2)(i), a plaintiff must show that the employer "acted with a consciously, subjectively, and deliberately formed intention to produce the specific result [of] injury or death to an employee." Pet. App. 17a-18a. Under § 23-4-2(c)(2)(ii), a plaintiff must show that the employer a) maintained a workplace in which a specific unsafe working condition presented a high risk of serious injury or death; b) had a subjective realization and appreciation of the risk presented; and c) that the condition violated a safety statute, regulation, or accepted industry practice. Pet. App. 18a-19a.

The court concluded that offensive collateral estoppel could not be applied to claims under § 23-4-2(c)(2)(i) because the jury had found only that Union Carbide had acted "intentionally, oppressively, willfully, maliciously, *or* in wanton or reckless conduct or criminal indifference":

> Because the interrogatory was asked in the disjunctive form, using the term "or," this Court cannot determine which of these terms the jury actually believed accurately described [Union Carbide's] actions. There is a possibility that the jury found [Union Carbide] acted [only] recklessly or willfully or wantonly, which . . . is insufficient to demonstrate deliberate intent under [§ 23-4-2(c)(2)(i)].

Pet. App. 20a. In contrast, the court found that the jury's finding *was* sufficient to demonstrate employer "realization and appreciation" of "unsafe working condition[s]" under § 23-4-2(c)(2)(ii), and that the presence of asbestos fibers in the air was an "unsafe working condition" that violated industrial hygiene standards. *See* Pet. App. 18a, 20a-21a. Finally, the court concluded that the remaining four elements of West Virginia's test for offensive collateral estoppel were clearly satisfied as to type (ii) claims. *Id.* at 21a-22a.

In February 2003, the trial court denied post-trial motions filed by Union Carbide. At that point, rather than proceed to

the Phase II "mini-trials" of causation and compensatory damages for small groups of plaintiffs with similar claims and exposure criteria, Union Carbide filed a "Writ of Prohibition, Or In the Alternative, Petition for Appeal" with the West Virginia Supreme Court. On June 17, 2003, the State Supreme Court issued a brief order simply stating that the "petition for writ of prohibition prayed for by the petitioner is hereby refused." Pet. App. 2a. This petition followed.

REASONS FOR DENYING THE PETITION

I. THE INTERLOCUTORY DECISION OF THE STATE SUPREME COURT IS NOT A REVIEWABLE "FINAL JUDGMENT."

Petitioner asks this Court to review the judgment below even though only one phase of the trial plan has been completed, and Union Carbide has not been held liable for any damages whatsoever. This Court has emphasized, however, that the statutory provision governing review of state court decisions, 28 U.S.C. § 1257(a), "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). A state court judgment is not reviewable unless it is "final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Id.* Plainly, the jury's entry of a verdict on the common issues tried in "Phase 1" of these proceedings is not "final as an effective determination" of this litigation. Issues relating to whether Union Carbide's behavior caused harm to any particular plaintiff and what compensatory damages should be assessed will not be addressed until the Phase II mini-trials.

The requirement of finality "serves several ends: (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional

issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973). These ends are clearly implicated here. Perhaps most importantly, there is an ongoing state process in place for achieving a "final" determination of plaintiffs' claims—a process consistent with the way that West Virginia has resolved tens of thousands of asbestos cases in the past. At this point, the West Virginia Supreme Court has merely declined to exercise its discretion to review an interim step in that process, presumably because such interlocutory review would be premature. To hold that a state supreme court commits constitutional error by declining to grant extraordinary relief at an interlocutory phase would seriously intrude on the autonomy of state judiciaries. In addition, the unfinished procedural posture of this case creates a likelihood of piecemeal appeals.

Petitioner argues that a state supreme court denial of a writ of prohibition "is a distinct lawsuit that is finally determined even if further proceedings are to be had in the lower court." Pet. App. 6. The cases cited by petitioner in support, however, are very different from this case. All of them involved jurisdictional claims that could have ended the litigation. The dispute in *Madruga v. Superior Court*, 346 U.S. 556, 557 (1954), was whether a state court had jurisdiction over a "case for sale of a vessel and partition of the proceeds," or whether "only the United States district court sitting in admiralty could take jurisdiction to consider such a case." Similarly, *Bandini Co. v. Superior Court*, 284 U.S. 8, 13-14 (1931), "merely dealt with . . . jurisdiction"; the "only question before [this Court was] . . . whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based." Finally, *Fisher v. District Court*, 424 U.S. 382, 383 (1976), presented the question whether a state court, rather than a tribal court, "has jurisdiction over an adoption proceeding in which all parties are members of the Tribe and

residents of the Northern Cheyenne Indian Reservation." Citing *Madruga* and noting that the dispute had been brought to the Montana Supreme Court as an original proceeding seeking an extraordinary writ, the Court in *Fisher* held that "[a] judgment that terminates original proceedings in a state appellate court, in which the only issue decided concerns the jurisdiction of a lower state court, is final, even if further proceedings are to be had in the lower court." *Id.* at 385 n.7.

This case, like *Madruga*, *Bandini*, and *Fisher*, arises from a request for an extraordinary writ. But the similarity ends there—unlike in those cases, the jurisdiction of the lower court is *not* at issue here and *no* decision by this Court could have the effect of ending the litigation. At most, petitioners would obtain a judgment from this Court providing guidance on how asbestos trials should be structured. Accordingly, concluding that the decision below is a final judgment would stretch the language of section 1257 far beyond the modest steps this Court has taken in permitting review in unusual cases, and far beyond any sensible meaning of the final judgment language. Indeed, the result petitioners seek would inappropriately relegate section 1257's final judgment rule to the status of "one of those technicalities to be easily scorned." *Jefferson*, 522 U.S. at 81 (citation omitted).

Petitioner also argues that "a refusal immediately to review the state court decision might seriously erode federal policy." Pet. App. 8 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975)). Petitioner does not, however, identify any specific "federal policy" that might be "seriously eroded" by failure to review the interim decision at issue, or cite a *single* case remotely analogous to this in which the court has granted certiorari at an interim stage. Instead, petitioner makes the surprising claim that "federalism" requires this Court to find a constitutional violation where the West Virginia Supreme Court has declined to provide extraordinary relief. To the contrary, "federalism" obviously counsels that

this Court should be reluctant to interfere in ongoing state-court proceedings.

Petitioner also makes the curious claim that this Court should grant review now because the case may otherwise be "mooted on state law grounds," or Union Carbide may succumb to "pressure to settle," and the opportunity to review "important federal issues" may be "lost." Pet. 8. This argument stands the Court's criteria for granting certiorari on their heads—petitioner suggests that the Court *should* grant review because the case may otherwise be resolved without the need for the Court's intervention. That is, of course, a reason *not* to grant review. Moreover, as to "pressure to settle," Union Carbide is clearly represented by expert counsel who will have the opportunity to defend their client on issues of causation and damages in further proceedings. If Union Carbide is confident that it can show that its products and premises did not cause injury to plaintiffs, then it should proceed to Phase II trials on those issues; if not, it should consider settling. Significantly, however, Union Carbide's position is no different from that of any defendant defending multiple lawsuits raising the prospect of potentially substantial liability.

II. THE FIRST QUESTION PRESENTED DOES NOT MERIT REVIEW.

The petition makes little effort to justify review of the West Virginia courts' establishment of a punitive damages "multiplier" of three times compensatory damages under this Court's usual standards for issuance of the writ. Petitioner does not claim, for example, that the lower court judgment evidences confusion among the state supreme courts or the federal courts of appeal. It does not. Nor does petitioner claim that the result below is inconsistent with this Court's guidance regarding acceptable ratios between punitive and compensatory damages. It is not. Instead, petitioner is

reduced to arguing that the writ should issue because the lower courts' trial plan—which assigned responsibility for measuring defendant's reprehensibility (through assignment of a punitive damages multiplier) to the "Phase I" jury hearing evidence regarding defendant's knowledge of the dangers of asbestos and consequent actions—allegedly violated an ill-defined "right to due process" purportedly discernible from this Court's cases. There was no such violation.

In attempting to raise the specter of conflict with this Court's cases, petitioner predictably relies on *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). At the outset, however, the striking dissimilarities between that case and this bear emphasis. In *State Farm*, the Utah Supreme Court approved compensatory damages of $1 million and punitive damages of $145 million against State Farm for alleged bad faith, fraud, and intentional infliction of emotional distress in its representation of its insureds, the Campbells, in a wrongful death action. This Court acknowledged that "State Farm's handling of the claims against the Campbells merits no praise," *id.* at 1521: State Farm had improperly altered company records to make Campbell appear less culpable; had exercised poor judgment in taking the case to trial; and had amplified the eventual judgment's effect on the Campbells by first advising them that their assets would be safe, and then telling them, postjudgment, to put a for-sale sign on their house. *Id.* Nonetheless, this Court found that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* at 1524. A punitive damages to compensatory damages ratio of 145 to 1 as punishment for inflicting a year and a half of emotional distress on the Campbells was understandably deemed excessive. *Id.*

This case could hardly be more different. Here, after hearing voluminous testimony from both sides regarding

Union Carbide's industrial hygiene practices at the sites in question, the jury found that Union Carbide had maintained "unreasonably dangerous" premises for over three decades, from 1945-1980. Pet. App. 13a. In so doing, the jury found, Union Carbide had acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference." Pet. App. 13a-14a. Based on these findings, the jury concluded that a punitive damages multiplier of three should be applied to compensatory damages in cases where plaintiffs ultimately succeed (in future "mini-trials") in showing causation and compensatory damages.[6] That determination is entirely consistent with *State Farm*'s admonition that "few awards *exceeding* a single-digit ratio" between punitive and compensatory damages will be appropriate. 123 S. Ct. at 1524 (emphasis added). Indeed, there is a long "history, dating back over 700 years . . . of double, treble, or quadruple damages to deter and punish." *State Farm*, 123 S. Ct. at 1524. The punitive damages multiplier adopted below falls squarely within that tradition.

Because Union Carbide cannot challenge the substantive result below (the 3-1 ratio), it resorts to challenging the process by which the result was achieved. Specifically, petitioner claims that the jury's determination of "punitive damages without hearing any evidence of harm to any specific plaintiff" (Pet. 15) violates this Court's requirement that a "defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." Pet. 16 (citing *State Farm*, 123 S. Ct. at 1523). Once again, however, *State Farm* is obviously distinguishable from this case. There, this Court found that the 145-to-1 punitive to compensatory damages ratio approved by the Utah courts was expressly intended to "rebuke State Farm for its nationwide activities." 123 S. Ct. at 1522. The Court found

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[6] The jury *rejected* the plaintiffs' claims for punitive damages in connection with their products liability claims.

that many of those activities "bore no relation to the Campbells' harm," and that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *Id.* at 1523.

The punitive damages multiplier of three—adopted by the jury below for use in premises cases—was not based on "nationwide activities" or on "independent . . . acts" from those "upon which liability was premised." To the contrary, this petition relates to punitive damages based only on Union Carbide's reprehensible behavior at five plants located in West Virginia (at South Charleston, Institute, Alloy, Technical Center, and Sistersville) and one plant in Marietta, Ohio (directly across the Ohio River from Parkersburg, West Virginia). *All* of the premises plaintiffs in these consolidated cases allege injury at *these* specific premises. The jury found that Union Carbide had acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference" by maintaining "unreasonably dangerous" premises at *these* sites. Pet. App. 13a-14a. Accordingly, the behavior upon which the jury's punitive damages multiplier was based is in no way "independent from the acts upon which liability was premised." *State Farm*, 123 S. Ct. at 1523. To the contrary, that behavior is the basis of *every* claim of *every* premises plaintiff in this case.

Equally importantly, *no* punitive damages have actually been awarded at this point. The question whether Union Carbide's maintenance of "unreasonably dangerous" premises actually caused damages to individual plaintiffs, as well as the proper compensation for such damages, will be litigated in Phase II small-group trials that have not yet taken place. Only where Union Carbide's reprehensible behavior is ultimately found to have caused damages to particular individuals, and compensatory damages are awarded, will the punitive damages multiplier adopted by the "common issues" jury be applied. Actual punitive damages—if any—will thus

be three times *the specific compensatory damages awarded for specific harm that petitioner caused a specific plaintiff*. It is undeniable that such punitive damages will directly calibrate Union Carbide's punishment to the harm that it caused individual plaintiffs. Accordingly, petitioner's suggestion that punitive damages here, as in *State Farm*, "b[ear] no relation to the [plaintiffs'] harm," is simply incorrect, and its arguments for review of the first question presented should be rejected.

III. THE SECOND QUESTION PRESENTED DOES NOT MERIT REVIEW.

Union Carbide's second question presented is only a minor variation on its first: petitioner argues that applying the punitive damages multiplier determined below "to premises cases from Marietta, Ohio" would violate "this Court's holding in *BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 571, 73 (1996), and [*State Farm v.*] *Campbell*, that principles of state sovereignty and comity prohibit a State from using economic sanctions to change conduct in other States." Pet. 18. Once again, however, this case is worlds removed from *State Farm*.[7]

As described above, *State Farm* was a suit by individuals insured by State Farm against the company seeking damages for bad faith, fraud, and intentional infliction of emotional distress. This Court found that the "case . . . was used as a

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[7] *BMW v. Gore* is even farther afield. There, this Court pointed out that the behavior punished by the lower court judgment was entirely legal in many states. *See* 517 U.S. at 569 & n.13. It held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572. Here, in contrast, petitioner does not suggest that while maintaining "unreasonably dangerous" premises "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference" is illegal in West Virginia, it would be "lawful conduct" in other states.

platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion ma[de] explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct[ed] toward the Campbells." 123 S. Ct. at 1521. The *State Farm* Court concluded that an award of punitive damages on that basis is improper: "Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion [in the case], and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction." *Id.* at 1522.

Plaintiffs here, in contrast, do not seek to punish Union Carbide for its "operations throughout the country." Indeed, even petitioner does not maintain that the punitive damages multiplier adopted below reflected any effort to "condemn[Union Carbide] for its nationwide policies." Rather, as previously noted, the punitive damages multiplier applies only to premises claims in connection with the five West Virginia plants at issue, and a neighboring Ohio plant.

Petitioner's second question presented thus essentially reduces to the suggestion that the West Virginia courts may have improperly applied (or failed to apply) West Virginia choice-of-law analysis to the relative handful of plaintiffs in these cases claiming injury at the Marietta, Ohio site.[8] Whether true or false, that is not a question meriting review by this Court, but is, at most, one for the West Virginia Supreme Court. And petitioner does not appear even to have laid the groundwork for a proper objection to that Court regarding the trial court's choice-of-law ruling. As this Court held in *Phillips v. Shutts*, 472 U.S. 797, 816 (1985), the first step in demonstrating that some law other than forum law

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[8] As further set forth *infra* at 26, the record does not reflect precisely how many such plaintiffs there are because petitioner failed to present evidence on that issue to the trial court.

must be applied is a showing of a "material" conflict on issues relevant to the case. Here, petitioner provides no evidence whatsoever that it properly established *any* such conflict between West Virginia law and that of another state before the trial court prior to the choice-of-law ruling. Nor does petitioner reference any post-ruling arguments to the trial court framing the issue.

Finally, petitioner seizes on the language of the trial court's "Special Interrogatory 4" to argue that the punitive damages award was based on "hypothetical claims," rather than those of plaintiffs actually before the trial court. Pet. 18 and n.21. Special Interrogatory 4 asked the jury:

> Do you find from a preponderance of the evidence that, when non-employee workers were present on the sites owned by Union Carbide, Union Carbide acted intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct or criminal indifference to civil obligations affecting the rights of others and should therefore pay punitive damages?

Pet. App. 13a-14a. The jury answered "yes." *Id.* Nothing about this question and answer, however, suggests that the jury's finding was based on "hypothetical claims." Rather, the jury heard extensive evidence that Union Carbide maintained "unreasonably dangerous" premises, in blatant disregard for the safety of the workers at those sites. Union Carbide primarily defended on the ground that the workers were "employees of contractors," not of Union Carbide, and that "the contractor was contractually responsible for the protection of its employees." Pet. 13-14. Accordingly, it is disingenuous of Union Carbide now to suggest that Special Interrogatory 4 was flawed because it *acknowledged* Union Carbide's *own argument* that many of the worksite plaintiffs were *not* Union Carbide employees.

IV. THE THIRD QUESTION PRESENTED DOES NOT MERIT REVIEW.

Petitioner's third question presented is premised on the notion that the trial below represented a "mass trial" that denied Union Carbide a reasonable "opportunity to be heard." Pet. at 19. As set forth above, however, by the time the trial reached defendant's presentation of its case, *Union Carbide was the only defendant left in the trial.* As a result, the idea that Union Carbide was not given an "opportunity to be heard" sufficient to comport with due process borders on the absurd. In any event, Union Carbide does not even attempt to demonstrate that this question satisfies the Court's criteria for issuance of the writ.

A. Union Carbide Had A Meaningful (And Indeed, Lengthy) Opportunity To Be Heard.

Petitioner does not argue that the consolidation of plaintiffs' suits against it directly conflicts with any specific precedent of this (or any other) Court, but instead vaguely maintains that the trial denied it the opportunity to be heard "in a meaningful manner." Pet. 19. More specifically, while petitioner acknowledges that aggregating cases for trial "does not *per se* violate the requirement of due process," it claims that "[i]n this case the aggregation did violate due process because the lack of commonality and prejudice meant [Union Carbide] could not exercise its right to be heard." Pet. 20.

Given the fact that Union Carbide was the sole defendant to present its arguments to the jury, it is frankly difficult to understand exactly what petitioner is talking about. It appears, however, that petitioner may wish to challenge the West Virginia courts' original determination that these cases contained sufficient common factual and legal issues to justify grouping them together for trial—but yet without explaining how that determination was made, or that it was

previously challenged before the West Virginia courts and this Court.

Consideration of commonality began in August 2000, when the Chief Justice of the West Virginia Supreme Court referred the Rule 26.01 motion to a trial judge "for the purpose of conducting a hearing and submission of findings of fact and a recommendation to the Chief Justice regarding the motion to refer" these asbestos cases. 12/21/00 Administrative Order at 1. At a brief October 2000 hearing, the trial judge determined that "the major issue" for a subsequent hearing would be whether the cases "generally come in" under Rule 26.01, that is, "[d]o they involve a common question of fact, common issues [of law]?" 10/17/00 Hearing Tr. at 23.

The transcript of the November 8, 2000 hearing on commonality runs to more than 100 pages. Counsel for several of the 250 defendants then involved in the case—specifically, USX and CSX Transportation and Norfolk Southern Railway Company—argued at the hearing that the cases did not exhibit the commonality of issues required by West Virginia Rule 26. However, counsel speaking "on behalf of most of the defendants" presented a contrasting view, stating that "defendants do believe that there are some common issues [to be tried] and that there is a basis, under Rule 26 . . . for the handling of asbestos cases with a referral to the Mass Litigation Panel." 11/08/00 Tr. 45, 46. Counsel for Union Carbide did not disagree. In findings of fact and conclusions of law submitted to the Chief Justice on November 15, 2000, the trial court agreed with "[t]he plaintiffs and defendants . . . that the cases should be sent to the mass litigation panel." 11/17/00 Order at 2. On November 17, 2000, West Virginia's Chief Justice issued an order adopting the lower court's findings and conclusions.

In December 2001, after the trial court's adoption of the trial plan now being implemented, Mobil Corporation unsuccessfully sought mandamus from the West Virginia Supreme

Court to stop the consolidated trial from going forward. Mobil then petitioned this Court for a writ of certiorari, arguing that the West Virginia courts had consolidated thousands of cases against hundreds of defendants without any inquiry into the commonality of those claims, and that the consolidation violated due process. In opposing the petition, plaintiffs pointed out (*inter alia*) that the West Virginia courts in fact *had* conducted a proper inquiry into commonality, as described above. This Court denied the petition. *See Mobil Corp. v. Adkins*, 123 S. Ct. 346 (2002).

Union Carbide, which filed a brief in support of Mobil's petition with this Court, appears to wish to revisit this issue. Clearly, however, whatever appeal Mobil's arguments had in 2001, when the consolidation did, indeed, involve hundreds of defendants—albeit *after* a proper inquiry into commonality—has now evaporated. Again, it cannot be overemphasized that Union Carbide was *the only defendant* to present its defense to the jury on the Phase I common issues. Petitioner had ample opportunity to argue its case. And argue it did. On October 8, 2002, plaintiffs rested their case-in-chief against Union Carbide, which promptly began presenting its defense. For over a week, petitioner presented and presented, in arguments to the jury and live testimony totaling close to two thousand pages of trial transcript.[9] In light of this fact, Union Carbide's claim that it was denied a reasonable opportunity to be heard is simply preposterous.

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[9] As noted above, Union Carbide argued on the products claims that its particular brand of asbestos ("Calidria") does not cause asbestos-related disease, and that, in any event, the company had discharged its duty to warn about the hazards of its asbestos products. *See* Pet. 13. On the premises claims, Union Carbide argued that the contractor at each premise (not Union Carbide) was contractually responsible for the protection of employees. *See Id.* 13-14. These thousands of pages of arguments do not address the specifics of whether any individual plaintiff was harmed, because such issues of causation and damages are to be tried in Phase II small-group trials.

It follows that petitioner's half-hearted effort to analogize this case to *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), fails as well. As petitioner acknowledges, the class at issue there was intended "to achieve a global settlement of current and future asbestos-related claims nationwide" against *all* potential defendants. Pet. 20. The proceedings here do nothing of the sort. Rather, they will adjudicate the liability of a *single* defendant, Union Carbide, to *specific*, identified plaintiffs for *current* claims arising primarily from exposure in West Virginia. Indeed, even petitioner stops short of claiming a specific conflict between this case and *Amchem*, because clearly there is none. Unlike all of the myriad potential defendants in *Amchem*, petitioner had a full and fair opportunity to defend itself on the issues tried in Phase I, and will have a further opportunity to do so in Phase II trials on causation and damages.

B. Petitioner Has Not Properly Presented Its "Choice-Of-Law" Issue Either To The West Virginia Courts Or To This Court.

The second half of petitioner's argument in connection with its third question presented is even more befuddling than the first. Petitioner does *not* claim that the question whether the West Virginia courts properly applied long-settled West Virginia precedent governing conflicts of law in these cases is an issue meriting review by this Court—and of course it is not.[10] Rather, petitioner makes the unusual argument that the West Virginia courts' purported "disregard of *Shutts*" somehow calls the fundamental fairness of employing a consolidated trial against Union Carbide into question, purportedly making *that* an issue warranting this Court's review.

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[10] As noted above, *see* Part III, *supra*, that question is, at most, one for the West Virginia Supreme Court. That Court has not, however, ever addressed the issue, presumably because—as further discussed below—petitioner has failed properly to present it.

First, *Phillips v. Shutts*, 472 U.S. 797 (1985), is obviously inapposite here. In *Shutts*, this Court held that in order for a forum state—Kansas, in that case—to apply forum law to claims asserted by a class action, the state "must have a 'significant contact or aggregation of contacts' to the claims asserted by each member of the plaintiff class . . . to ensure that the choice of Kansas law is not arbitrary or unfair." *Id.* at 821-22. Significantly, however, even though some "97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit," *id.* at 814-15, this Court held that there could be no constitutional defect in Kansas' application of forum law without a prior showing of an actual conflict on issues relevant to the case: "We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit." *Id.* at 816.

Here, although petitioner repeatedly suggests that West Virginia is a "magnet state for the filing of asbestos cases," *see, e.g.*, Pet. 19, it does not appear to have presented evidence to the trial court proving that any significant number of the plaintiffs (let alone 97%) "had no apparent connection" to West Virginia. Although the record thus does not reveal exactly what percentage of the plaintiffs reside in, claim exposure in, or otherwise have an "apparent connection" to West Virginia, there is no doubt that claimants with an obvious connection to West Virginia represent the vast majority of the plaintiffs in these consolidated cases.

More importantly, notwithstanding the requirement of *Shutts*, petitioner also does not appear to have made *any* effort to demonstrate to the trial court that there are specific, "material" conflicts between West Virginia law and that of another state that are relevant here. Indeed, even in its petition to this Court, petitioner's entire discussion of "material" conflicts is limited to footnotes, *see* Pet nn. 29 and 31.

Significantly, however, petitioner does not cite to any pleading or transcript before the trial court where Union Carbide (or anyone else) elaborated those (or any other) claims of conflict as required by *Shutts*.

Of course, even had Union Carbide done so, that would not make its third question presented any more worthy of review. Again, petitioner *does not seek review of the West Virginia courts' choice-of-law ruling*. Instead, petitioner's third question presented suggests that petitioner should be permitted an interlocutory challenge to West Virginia's entire Rule 26.1 process for consolidating cases *because* the West Virginia court purportedly failed to apply the state's settled conflicts law. That simply makes no sense. The proper way to challenge the trial court's choice-of-law ruling would, of course, be to appeal that ruling to the West Virginia Supreme Court at such time as any judgment against Union Carbide becomes final under state law. Petitioner has not done so yet, but the option remains open to it in the event (which, from the petition, appears questionable) that petitioner properly presented and preserved the issue before the trial court. In the event that it did not, petitioner certainly should not be allowed to revive its choice-of-law claim by merely cloaking it in due process language.

V. THE FOURTH QUESTION PRESENTED DOES NOT MERIT REVIEW.

Petitioner's final question presented bears little discussion. Petitioner does not seriously suggest that the lower court's routine application of West Virginia law on collateral estoppel will create conflict among jurisdictions, or that it conflicts with any specific precedent of this Court. Instead, petitioner merely seeks correction of an alleged error by the trial court—specifically, the court's ruling that the jury finding that Union Carbide acted "intentionally, oppressively, willfully, maliciously, or in wanton or reckless conduct"

satisfies § 23-4-2(c)(2)(ii)'s requirement of employer "realization and appreciation" of the existence of unsafe working conditions.

Petitioner argues that the trial court's interpretation of § 23-4-2(c)(2)(ii) is inconsistent with the West Virginia Supreme Court's ruling in *Mayles v. Shoney's, Inc.*, 405 S.E.2d 15, 19 (W. Va. 1990). *See* Pet. 28. If so, petitioner's proper recourse is, once again, obviously to the West Virginia Supreme Court. As with petitioner's choice-of-law claim, mere invocation of a vague "right to due process" cannot transform a purported misapplication of settled state law into a federal constitutional claim meriting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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